SUBRAMANIAM MURUGAN v. PP

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
VAZEER ALAM MYDIN MEERA JCA
AHMAD NASFY YASIN JCA
[CRIMINAL APPEAL NO: B-06B-42-06-2018]
18 DECEMBER 2020

CRIMINAL PROCEDURE: *Appeal – Abatement of appeal – Appellant passed away during pendency of appeal from High Court to Court of Appeal – Whether appellant's wife could substitute – Whether appeal abated upon appellant's death pursuant to s. 320 of Criminal Procedure Code ('CPC') – Whether s. 320 of CPC confined to appeals from subordinate courts to High Court – Whether widow had genuine and legally recognisable pecuniary interest in pursuing appeal*

PUBLIC LAW: *Public servants – Death of public servants during pendency of criminal appeal – Whether appeal abated upon death of public servant – Application by widow to substitute – Whether widow had sufficient and legally recognised interest in outcome of appeal – Criminal Procedure Code, s. 320 – Pensions Act 1980, s. 14(1)*

The appellant died pending his appeal to the Court of Appeal pursuant to s. 50 of the Courts of Judicature Act 1964 ('CJA') in respect of his conviction and sentence of imprisonment by the High Court for two offences under s. 165 of the Penal Code. The applicant, the widow of the deceased appellant, filed the current application, seeking orders that the appeal should continue under her name, and that she be appointed as the personal representative of the appellant. The applicant contended that she had the legal standing and interest to prosecute the appeal, on the grounds that: (i) the appellant was a public servant on a pensionable scheme of service; (ii) as a widow, she had the right to draw the Government pension that the appellant was entitled to upon his death; (iii) if the appeal was to abate and the appellant's conviction and sentence remained, the applicant would lose her rights to the pension; and (iv) therefore, the applicant had the pecuniary interest to the outcome of the appeal, and this interest entitled her to substitute the appellant as his personal representative to preserve the appeal. In opposing the application, the Deputy Public Prosecutor ('DPP') submitted that the appeal had statutorily abated upon the appellant's death by virtue of s. 320 of the Criminal Procedure Code ('CPC'). As such, there was no appeal pending or subsisting for the applicant to substitute and prosecute. The applicant further posited that: (i) s. 320 of the CPC was inapplicable to the current application as the appeal was not an appeal from the subordinate courts to the High Court, but, an appeal from the High Court to the Court of Appeal that was lodged pursuant to s. 50(1) of the CJA; (ii) there is no provision in the rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, *ie*, the Rules of the Court of Appeal 1994, that has the same effect

as s. 320 of the CPC; and (iii) as such, there is a *lacuna* in the law in so far as it concerns with the effect of death of an appellant pending appeal in the Court of Appeal against conviction and sentence, be it against fine and/or imprisonment. Hence, the issues that ought to be determined for the current application were mainly on: (i) whether s. 320 of the CPC is applicable to an appeal filed to the Court of Appeal under s. 50 of the CJA; and (ii) whether the applicant had a substantial pecuniary interest to the outcome of the appeal, so as to entitle her to substitute the appellant, as personal representative to prosecute the appeal.

Held (allowing application)

Per Vazeer Alam Mydin Meera JCA delivering the judgment of the court:

(1) By the clear words of the second limb in s. 320 of the CPC, appeals that abate upon the death of the appellant are confined to appeals that emanate from the subordinate courts to the High Court, and not to any other appeals. Section 320 of the CPC has no bearing on the appeal and the legal implication of the death of the appellant pending his appeal at the Court of Appeal could not be determined by applying the provisions of the section as its application must be confined only to appeals pending at the High Court. Therefore, the reliance placed by the DPP on the provisions of s. 320 of the CPC was misplaced. (paras 18-19 & 24)

(2) The applicant had shown a genuine and legally recognisable pecuniary interest in pursuing the appeal, in that: (i) she had a direct legal interest on the outcome of the appeal. If the appellant's right to appeal abated upon his death and the conviction and sentence became final, the appellant would lose all of his pension rights. The effect of that in law to the applicant is that, she would be prevented from receiving the appellant's pension which would, in ordinary circumstance, flow to her upon the appellant's death; (ii) her right towards the appellant's derivative pension was also statutorily regulated. According to both s. 14(1) of the Pensions Act 1980 ('Act') and reg. 15 of the Pensions Regulations 1980, a civil servant who has not misconducted himself has the legitimate expectation to receive pension on his retirement in accordance to the terms of service, and, in the event of his untimely death during his service, the widow of the civil servant would be entitled to the civil servant's derivative pension. Meanwhile, s. 21 of the Act provides that in the event the appellant's conviction and sentence were to be quashed, it would not be in dispute that the applicant would receive the appellant's derivative pension; and (iii) the right to receive a derivative pension is also considered to be included within the ambit of constitutional right to life as embodied in art. 5(1) of the Federal Constitution. (paras 29, 30 & 44-46)

(3) Since the applicant had demonstrated sufficient legal interest in the outcome of the appeal, in that, it could potentially affect her rights to the derivative pension, the current application was allowed and the following orders were entered: (i) the applicant be appointed as the personal representative of the deceased appellant; (ii) the applicant be allowed to substitute the appellant and continue with the appeal; and (iii) the applicant, as personal representative of the deceased appellant, be named as the appellant in place of the deceased appellant in all cause papers filed and to be filed in the proceedings. (paras 50 & 51)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Bondada Gajapathy Rao v. State of Andhra Pradesh [1964] 7 SCR 251 ***(refd)***
Choo Cheng Liew v. PP [1997] 1 CLJ 520 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Ealumalai Mottayan lwn. PP [2017] 7 CLJ 68 HC ***(dist)***
Harnam Singh v. The State of HP 1975 AIR 236 ***(refd)***
Hodgson v. Lakeman [1943] 1 KB 15 ***(refd)***
Karpal Singh Ram Singh v. PP & Another Appeal (No 2) [2016] 8 CLJ 65 CA ***(not foll)***
Parker v. Parker (1954) 15 All ER 22 ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
R v. Jefferies (1968) 3 All ER 238 ***(refd)***
R v. Rowe [1955] 2 All ER 234 ***(refd)***
R v. Smith 2004 SCC 14 (CanLII) ***(refd)***
Re: Abdullah (2018) LPELR-45202 ***(refd)***
Shuib Abdul Samad v. Tan Sri Dato' Seri Khalid Abu Bakar & Ors [2017] 10 CLJ 89 CA ***(refd)***
State v. Webb 167 Wn2d 470 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] KB 718 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Courts of Judicature Act 1964, ss. 50(1), 66(1)
Criminal Procedure Code, ss. 306, 320
Federal Constitution, arts. 5(1), 147
Penal Code, s. 165
Pensions Act 1980, ss. 3(1), 14(1), 21
Pensions Regulations 1980, reg. 15
Prevention of Corruption Act 1961 (repealed), s. 4(a)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 28(9), 31(1)

Criminal Procedure Code [Ind], s. 394
Criminal Procedure Code [Sing], s. 393

For the applicant - M Athimulan & R Vikraman
For the respondent - Nurul Farhana Khalid; DPP

[Editor's note: For the High Court judgment, please see Subramaniam Murugan lwn. PP [2018] 1 LNS 1121 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Vazeer Alam Mydin Meera JCA:

Introduction

[1] This application raises an important question of law, and that is, whether the widow of a deceased appellant, whose appeal against conviction and sentence of imprisonment for two offences under s. 165 of the Penal Code, pending disposal in this court at the time of his death, was entitled to substitute the appellant as the personal representative and continue to prosecute the appeal.

Background Facts

[2] The appellant was convicted of two charges under s. 165 of the Penal Code, and was imposed concurrent sentences of four months imprisonment for each offence by the Sessions Court at Shah Alam.

[3] The High Court at Shah Alam dismissed the appellant's appeal, and affirmed the conviction and sentence. The appellant then appealed against both conviction and sentence to the Court of Appeal pursuant to s. 50 of the Courts of Judicature Act 1964 ("CJA"); and had obtained a stay of execution of the sentence. Whilst awaiting the hearing of the appeal, the appellant passed away.

[4] The appellant's widow, Madam S Ponnamah a/p Sinnappan, *vide* notice of motion (encl. 15) applied for orders:

(i) that she be appointed the personal representative of the appellant; and

(ii) for the appeal to be continued in the name of Madam S Ponnamah a/p Sinnappan, as the personal representative of the deceased appellant.

[5] In support of the application, the applicant, Madam S Ponnamah a/p Sinnappan, states that she has legal standing and interest to prosecute the appeal on grounds that:

(i) the appellant was a public servant, ie, a school principal on the pensionable scheme of service;

(ii) ordinarily as the appellant's widow, upon the appellant's death she would stand to draw the Government pension that the appellant was entitled to;

(iii) however, if the appeal were to abate and the appellant's conviction and sentence remained, then she would lose her rights to the pension.

Hence, the applicant contended that she had a pecuniary interest in the outcome of the appeal, and that this interest entitled her to substitute the appellant as his personal representative to preserve the appeal.

[6] However, the Public Prosecutor opposed the application on grounds that the appeal had abated upon the appellant's death by virtue of the statutory provisions in s. 320 of the Criminal Procedure Code ("CPC").

The Issues

[7] There are several issues for determination in this application, and they are:

(i) whether s. 320 of the CPC, where an appeal shall finally abate on the death of the appellant, applies to an appeal filed to the Court of Appeal under s. 50 of the CJA;

(ii) whether irrespective of s. 320 of the CPC, an appeal to the Court of Appeal under s. 50 of the CJA against conviction and sentence of imprisonment finally abates on the death of the appellant during the pendency of the appeal; and

(iii) whether the appellant's widow having a substantial pecuniary interest in the outcome of the appeal is entitled to substitute the appellant as the deceased's personal representative and to prosecute the appeal.

Submissions

[8] The learned Deputy Public Prosecutor Puan Nurul Farhana binti Khalid, who appeared for the respondent, argued that according to s. 320 of the CPC, any pending appeal (other than an appeal against a sentence of fine or a composite sentence of fine and imprisonment) shall abate upon the death of the appellant.

[9] Section 320 of the CPC provides:

> **320 Death of parties to appeal**
>
> Every appeal under section 306 shall finally abate on the death of the accused, and **every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.** (emphasis added)

There are two limbs to s. 320 CPC. The first limb relates to pending appeals filed by the Public Prosecutor under s. 306 of the CPC against acquittals by a Magistrate, which is not applicable here. The second limb relates to any pending appeal under Chapter XXX of the CPC, which is the chapter in which s. 320 of the CPC is found. The learned Deputy Public Prosecutor contended that pursuant to the second limb of s. 320 of the CPC the appeal in this case would have statutorily abated upon the death of the appellant on

17 October 2019. Thus, the respondent submitted that following the death of the appellant, there was no appeal pending or subsisting for the applicant to substitute and prosecute on his behalf.

[10] Mr M Athimulan, learned counsel for the applicant, argues the contrary and contends that s. 320 of the CPC has no application to the present appeal. Learned counsel submits that the appellant's appeal to the Court of Appeal does not come under Chapter XXX of the CPC (alluded to in s. 320 as "appeal under this Chapter"), which deals with appeals to the High Court from the subordinate courts; but were instead lodged pursuant to s. 50(1) of the CJA that provides for the Court of Appeal's jurisdiction to hear and determine appeals from the High Court.

[11] Section 50(1) of the CJA reads as follows:

> **50 Jurisdiction to hear and determine criminal appeals**
>
> (1) **Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals,** the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (emphasis added)

[12] Learned counsel for the applicant further submits that there is no provision in the rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, ie, the Rules of the Court of Appeal 1994, that is similar in effect to s. 320 of the CPC; and that which deals with abatement of a criminal appeal upon the death of an appellant during the pendency of an appeal from the decision of the High Court.

[13] Thus, learned counsel contends that there is a *lacuna* in the law in so far as it concerns the effect of death of an appellant on a pending appeal in the Court of Appeal against conviction and sentence, be it a fine and/or imprisonment.

Analysis Of The Arguments

(i) First Issue – Whether Section 320 Of The CPC Applies?

[14] We find that there is merit in the submissions of learned counsel for the applicant. In support of their respective contentions, both the learned Deputy Public Prosecutor and counsel for the applicant had referred to the Federal Court's judgment in *Choo Cheng Liew v. PP* [1997] 1 CLJ 520; [1997] 1 MLJ 345 FC. In *Choo Cheng Liew* (*supra*) the following questions of law were posed to the Federal Court for its determination under the then s. 66(1) of the CJA:

(i) Whether, by reason of s. 320 of the CPC an appeal by an accused to the High Court from conviction and a composite sentence of fine and imprisonment passed against him by the Sessions Court, in respect of offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss. 4(a) and 3(a), respectively, of the Prevention of Corruption Act 1961 finally abates on the death of the appellant during the pendency of the appeal?

(ii) Whether, the legality or propriety of such composite sentence of fine and imprisonment necessarily involves an examination of the validity of the conviction itself?

[15] The Federal Court answered the first question in the negative and the second question in the affirmative. Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court in *Choo Cheng Liew* said:

> In our view, the effect of s. 320 of our Code may be stated thus:
>
> > The following appeals to the High Court abate on the death of the accused during the pendency of the appeal:
> >
> > (1) appeals by the Public Prosecutor when an accused person has been acquitted pursuant to s. 306 of our Code, and
> >
> > (2) appeals against conviction where the only sentence imposed is that of imprisonment.
>
> The rule of abatement of criminal appeals contained in s. 320 of our Code does not apply to appeals from a sentence of fine or a composite order of sentence combining the substantive imprisonment with fine.

[16] It must be noted that in *Choo Cheng Liew*, the accused ("deceased") was convicted of an offence under s. 4(a) of the Prevention of Corruption Act 1961, and was sentenced by the Sessions Court to a day's imprisonment and a fine of RM4,000. He was also ordered to pay a penalty of RM500 to the Government. The deceased paid the fine and the penalty, and thereafter appealed against the conviction. The deceased, however, passed away while the appeal was pending in the High Court, whereupon his widow sought to prosecute the appeal on his behalf. The High Court Judge ruled that the effect of the appellant's death on the pending appeal was to finally abate the same having regard to s. 320 of the CPC. According to the learned High Court Judge, the widow had no legal interest in the outcome of the appeal, and therefore lacked *locus standi* to prosecute the same. Hence, the reference of the two questions of law to the Federal Court.

[17] As such, it is clear that the pronouncement of the Federal Court in *Choo Cheng Liew* was confined to the application of s. 320 of the CPC and the abatement of a criminal appeal upon the death of the appellant during an appeal's pendency in the High Court, and not the Court of Appeal. And by no stretch can it be said that the Federal Court's pronouncement could be

A equally applicable to a pending criminal appeal at the Court of Appeal, when the words of s. 320 of the CPC confines it to appeals under Chapter XXX of the CPC to appeals pending at the High Court.

[18] The second limb of s. 320 of the CPC in clear and unequivocal terms states that "every other appeal under this chapter (except an appeal against
B a sentence of fine) shall finally abate on the death of the appellant". The words "this Chapter" in s. 320 of the CPC refer to "Chapter XXX Appeal To The High Court". Thus, by it's clear words, appeals that abate upon the death of the appellant under s. 320 of the CPC are confined to appeals that come under Chapter XXX of the CPC, which are appeals that emanate from
C the subordinate courts to High Courts; and not any other appeals, such as the present one that is from the High Court to the Court of Appeal.

[19] To that extent, we agree with submissions of learned counsel for the applicant that under the circumstances of the facts of this case, the reliance by the learned Deputy Public Prosecutor on the provisions of s. 320 of the
D CPC is, with respect, misplaced.

[20] The learned Deputy Public Prosecutor has also referred to the case of *Ealumalai Mottayan lwn. PP* [2017] 7 CLJ 68; [2017] MLJU 182, where the High Court at Kuala Lumpur had declared that an appeal pending before it
E had by reason of s. 320 of the CPC abated upon the death of the appellant. The learned Deputy Public Prosecutor had informed this court that the Court of Appeal had on 20 April 2018 affirmed the High Court's decision in *Ealumalai* (*supra*) in Criminal Appeal No: W-06B-44-09-2017. Again, it must be pointed out that in the context and circumstances of the facts of *Ealumalai*'s case, where the appeal was pending at the High Court when the
F appellant had died, the reference to and application of s. 320 of the CPC was entirely correct and is consistent with the earlier pronouncement of the Federal Court in *Choo Cheng Liew*. However, the decision in *Ealumalai* would not bind this court, nor would it be persuasive to apply s. 320 of the CPC to the abatement of a pending appeal at the Court of Appeal upon the death
G of an appellant.

[21] Having said that, we must now consider the pronouncement of the Court of Appeal in *Karpal Singh Ram Singh v. PP & Another Appeal (No 2)* [2016] 8 CLJ 65, which was referred to by the learned Deputy Public Prosecutor. In that case, the judgment of which primarily dealt with the issue
H of sentencing, the Court of Appeal had in passing mentioned the provisions of s. 320 of the CPC in having earlier allowed the application of the widow of the late Karpal Singh to substitute and continue with the prosecution of the appeal after the death of the appellant during the pendency of the appeal at the Court of Appeal. In this regard, it would be worth reproducing the
I relevant passages of that judgment where s. 320 of the CPC was referred to:

[1] The appeals were formerly lodged by the late Karpal Singh a/l Ram Singh (YB Karpal) against both conviction and sentence handed down by the High Court under s. 4(1)(b) of the Sedition Act 1948. YB Karpal was fined RM4,000 in default four months imprisonment for the conviction. The said fine has since been paid.

[2] Before the appeals been finally heard and disposed of by this court, YB Karpal had passed away on 17 April 2014 in a motor vehicle accident. By virtue of s. 320 of the Criminal Procedure Code (CPC), both the appeals should finally be abated on the death of the YB Karpal. Nevertheless, by an order of this court dated 10 November 2014, the appeals were allowed to be proceeded by the widow of YB Karpal as substitutes. Section 320 of the CPC provides:

> 320. Death of parties to appeal
>
> Every appeal under section 306 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

[22] Whilst the Court of Appeal in that case had alluded to and applied the provisions of s. 320 of the CPC in allowing the widow to substitute and prosecute the appeal on behalf of the deceased appellant, we do not have the benefit of the reasoning of the Court of Appeal in applying s. 320 of the CPC to a pending appeal at the Court of Appeal, when the words of the said section clearly confines it to pending appeals at the High Court. In any event, the matter of substitution of the appellant by the widow was not a fact in issue at that material time. Hence, when construed in the context of the overall judgment, where the judgment focuses, in the main, on the issue of sentencing, we can only surmise that the comments by the Court of Appeal on s. 320 of the CPC in *Karpal Singh*'s case (*supra*) is mere *obiter*.

[23] The Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 FC, having referred to the decision of the English Court of Appeal in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718, and importing the principles enunciated therein into our body of laws by way of s. 3 of the Civil Law Act 1956, held that:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal. ...
>
> ... there are 3 exceptions to the general rule that the Court of Appeal is bound by its own decisions ... The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one,

A thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions ...

[24] Hence, we are of the view that the decision in *Karpal Singh (supra)* is B not binding on us as that decision was made *per incuriam*. We find that s. 320 of the CPC has no bearing on a pending appeal in the Court of Appeal, and thus the legal implication of the death of the appellant during the pendency of a criminal appeal before the Court of Appeal cannot be determined by applying the provisions of s. 320 of the CPC. The application of s. 320 of C the CPC must be confined to appeals pending at the High Court. The rule of abatement of criminal appeals contained in s. 320 of the CPC does not apply to appeals pending at the Court of Appeal. And in this regard, we agree with learned counsel for the applicant that there is a *lacuna* in the law.

(ii) Second Issue – What Is The Effect Of Death Of An Appellant On A Pending D *Criminal Appeal Before The Court Of Appeal?*

[25] If s. 320 of the CPC has no application to pending appeals before the Court of Appeal, what then is the effect of the death of an appellant on a pending criminal appeal before the Court of Appeal? A conviction is not final until all rights of appeal are legally exhausted. That is a fundamental E principle of our criminal justice system. The appeal before this court is made pursuant to s. 50 of the CJA. However, neither the CJA nor the Rules of the Court of Appeal 1994 spell out the effect of an appellant's death on the continuity of the appeal pending at the Court of Appeal. There are also no statutory provisions with regards to the abatement of an appeal at the Court F of Appeal upon the death of an appellant. To that extent this application is novel.

[26] The legal principle that a personal right of action, or in this case the personal right of appeal, dies with the person is summed up in the Latin maxim "*action personalis moritur cum persona*". However, in the present case, G if the appeal were to finally abate upon his death, it would have legal consequences for the widow. The deceased appellant was a Government servant on the pensionable scheme. As a public servant, the appellant is governed by the General Orders. In the ordinary course of events, the appellant would be interdicted upon being charged for a criminal offence. In H fact, as a result of the criminal charge, the appellant was interdicted and suspended from work since 7 October 2016. As a result of the interdiction, he would have lost some of his salary pending the completion of the criminal trial at the Sessions Court, and the exhaustion of the appeal process, both at the High Court and Court of Appeal. If the appellant were to succeed on his I appeal, he would be allowed to resume his duties, and shall be entitled to his arrears of salary, and loss of emoluments; and his pension rights would have remained unaffected.

[27] This is provided in reg. 28(9) of the Public Officers (Conduct and Discipline) Regulations 1993: A

> Where criminal proceedings against an officer result in his conviction but on appeal the officer is acquitted, the officer shall be allowed to resume his duties and he shall be entitled to receive any emoluments which had not been paid during the period of his interdiction or suspension or both, as well as the annual leave and other entitlements to which he was entitled during the period of his interdiction or suspension or both. B

(See *Shuib Abdul Samad v. Tan Sri Dato' Seri Khalid Abu Bakar & Ors* [2017] 10 CLJ 89; [2017] 4 MLJ 476, where the Court of Appeal allowed the widow of the appellant to substitute and claim arrears in salary, emoluments C and other benefits).

[28] Further, reg. 31(1) of the Public Officers (Conduct and Discipline) Regulations 1993 provides that:

> An officer who is acquitted of a criminal charge in any criminal proceedings shall not be subject to disciplinary action on the same charge. D

Hence, a Government servant who has been charged with a criminal offence and acquitted cannot be subjected to further disciplinary action in respect of the same charge. Therefore, it would be in the best interest of such Government servant to exhaust the entire criminal trial and appellate E process. Thus, the criminal conviction of the appellant, if it were allowed to remain unchallenged, has significant legal consequences to the appellant's estate, widow and children. To that extent, we find that the appellant's estate and his widow have sufficient legal interest to protect and pursue the appeal to its finality. F

[29] Further, if the appellant's right of appeal were to abate upon his death the conviction and sentence becomes final. In that event, the appellant would lose all his pension rights. The effect of that in law is that the widow, ie, the applicant, would be prevented from receiving the pension which would in ordinary circumstance flow to her upon her husband's death. The applicant G is a surviving spouse having sufficient legal interest in the matter.

[30] In *Choo Cheng Liew* (*supra*) the Federal Court alluded to the reasoning of the High Court Judge, where after considering several Indian cases on the issue, held as follows:

> These three Indian cases show a singular principle in that **the representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a "sentimental interest"**, for example, clearing the name of the convicted person; the exception is in the case of a sentence of fine. In India, where the appeal is against fine, the appeal may be permitted to be continued by the legal representatives of the deceased appellant. In India too, in the case of imprisonment, the sentence does not affect the property of the deceased accused and so the appeal abates upon his death (*Gajapathi Rao* [1964] SC 1645). (emphasis added)

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Hence, the principle enunciated in these Indian cases, and affirmed by the Federal Court, is that if the conviction and sentence does not affect the property of the deceased, the appeal abates upon the death of the appellant. And if the representative of the deceased convicted person can show sufficient legal interest to be preserved or protected by the continuation of the appeal, then the personal representative may be allowed to substitute for the deceased appellant and continue with the appeal. One such interest was the sentence of a fine, which would save the appeal from abatement, as the fine affects the property that would devolve unto the estate upon the death of the appellant, if the conviction stands. The rationale for that can be gleaned from the judgment of the Indian Supreme Court in *Harnam Singh v. The State of HP* 1975 AIR 236; 1975 SCR (2) 823, which was referred to by the Federal Court in *Choo Cheng Liew* (*supra*). Chandrachud J speaking for the Indian Supreme Court in *Harnam Singh* (*supra*) explained the rationale as follows:

> The reason of the rule contained in the exception is that a sentence of fine operates directly against the estate of the deceased and therefore the legal representatives are entitled to clear the estate from the liability.

In *Harnam Singh*, Chandrachud J further referred to the case of *Bondada Gajapathy Rao v. State of Andhra Pradesh* [1964] 7 SCR 251. In that case, there was an appeal pending at the Supreme Court against conviction and sentence for a charge of murder. The appellant died during the pendency of the appeal, and his son and daughter applied to substitute as his legal representatives contending that the conviction of their father had resulted in his removal from Government service, and if the conviction were set aside, the estate will be able to claim the arrears of salary from the date of his conviction till the date of his death. The Indian Supreme Court declined to allow the substitution on grounds that the interest of the legal representatives were contingent and not direct. However, it must be pointed out the interest of the widow in our case is direct, in that she is in the position to draw her late husband's pension if the conviction and sentence are set aside. She has a direct legal interest in the outcome of the appeal.

[31] In *Harnam Singh* (*supra*) the Indian Supreme Court further noted the unjust and anomalous position of the law, where a mere sentence of a fine would save the appeal from abatement, but not in cases of a sentence of imprisonment where there are far larger property and pecuniary interest at stake. In this regard, the Indian Parliament subsequently amended s. 394 of their Criminal Procedure Code, which now reads:

> **Section 394(2) in The Code Of Criminal Procedure, 1973**
>
> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant: *Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his*

near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate. Explanation – In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

(emphasis added)

[32] The main object of the amendment was not only to provide the legal avenue for the surviving spouse or family members of the convicted person who had died during the pendency of the appeal to challenge the conviction and get rid of the odium attaching to the family; but more importantly to allow for the estate or family members to protect and pursue their financial or property interest that would flow from the setting aside of the conviction.

[33] In this regard, it is worth noting that Singapore had also amended its Criminal Procedure Code to similarly allow the widow/widower, personal representative of the deceased or family members with substantial financial interest in the determination of appeal to substitute and prosecute the appeal. Section 393 of their Criminal Procedure Code now reads:

Death of party to appeal

393(1) Where a person has died:

(a) any relevant appeal which might have been begun by him if he were alive may be begun by a person approved by the High Court; and

(b) where any relevant appeal was begun by him while he was alive or is begun in relation to his case under paragraph (a), any further step which might have been taken by him in connection with the appeal if he were alive may be taken by a person so approved.

(2) The High Court may only give an approval to:

(a) the widow or widower of the deceased;

(b) a person who is the personal representative of the deceased; or

(c) any person appearing to the High Court to have, by reason of a family or similar relationship with the deceased, a substantial financial or other interest in the determination of a relevant appeal relating to him.

Hence, the Singapore position is somewhat similar to India, in that, upon the death of an appellant, a criminal appeal may be continued by a person approved by the court.

[34] The English position on abatement of an appeal upon the death of the appellant can be gleaned from several cases. The first case would be *Hodgson v. Lakeman* [1943] 1 KB 15, where the appellant had entered an appeal against conviction and sentence of a fine and died during the pendency of the appeal. Viscount Caldecote CJ held that when an appeal to the High Court against a conviction has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the court has jurisdiction to allow the executors to prosecute the appeal. In contrast to that,

in *R v. Rowe* [1955] 2 All ER 234, in dismissing the application of the widow to substitute the appellant who had died during the pendency of the appeal, Lord Goddard CJ after having referred to *Hodgson v. Lakeman* (*supra*), held that, where the widow of the deceased only wanted to clear his name, neither his widow nor the executors or administrators of the deceased appellant had any legal interest that would justify the court's allowing them to substitute and continue the appeal. The ground on which the widow's application was supported was that the conviction against her husband affected her chances of employment and her position among her friends. In rejecting that argument, Lord Goddard CJ said that the court cannot take notice of such a ground for substitution as the interest sought to be exerted by not a pecuniary one and observed:

> ... we cannot allow a widow or an executor or an administrator of a deceased person to appeal to this court unless they can show a legal interest ... **The basis of intervention, when permitted, is the survival of an interest in the heirs or executors of the deceased. That interest would only be a pecuniary one** and where the estate is not affected by the conviction there would be no ground for allowing the intervention of the heir or executor. (emphasis added)

When deciding whether to allow the intervention of an applicant with sufficient legal interest, the legal maxim "*ubi jus ubi remedium*" (where there is a violation of a right, there must be a remedy) comes into play. And in this regard, Lord Goddard CJ in *R v. Rowe* (*supra*) further observed that the strict application of the principle of abatement can lead to cases where injustice might result if persons having a legal interest in the estate of the deceased were shut out without remedy, and noted that:

> In *Hodgson v. Lakeman*, to which our attention was called, which was a case before the Divisional Court, but the principle would be the same, the Appellant was dead, and the **Court allowed the executors to continue the appeal because there was a pecuniary interest.** (emphasis added)

[35] In the United States of America, some states permit a substitute party to continue the appeal. When considering whether to apply abatement or an alternative doctrine, a myriad of competing interests are taken into account. These, among others, include interest of the defendant's heirs and next of kin. See the illuminating article on the subject by Timothy A Razel entitled "*Dying To Get Away With It: How the Abatement Doctrine Thwarts Justice – And What Should Be Done Instead*" in the Fordham Law Review, 2007, vol. 75, Issue 4, art. 7. In that article, the learned author having discussed the various approaches taken by the State and Federal courts in the United States of America in dealing with the issue of abatement, alludes to substitution as one of the option:

D. Option 4: Allow a Substitute Party to Continue the Appeal (Substitution).

An alternative so-called "moderation" approach, followed by some courts, allows a substitute party to continue and resolve the appeal. This is an attempt to balance the conflicting interests at play in the abatement doctrine. It protects the rights of the victims to any restitution, while at the same time, insuring that the late defendant retains his rights to resolve the appeal.

Hawaii, in adopting this alternative, posited the interests protected by substitution as follows: "[The defendant's] family seeks 'vindication' of the deceased. The State has an interest in preserving the presumptively valid judgment of the trial court." Also, the court recognised that it is equally undesirable to assume the conviction would have been overturned as it would be to deprive the dead defendant of his statutory right to appellate review. It relied heavily on a decision of the Ohio Supreme Court, *State v. McGettrick*, which also adopted substitution.

See for example the majority opinion of the State of Washington's Supreme Court in *State v. Webb* 167 Wn2d 470 for an application of the above "moderation approach".

[36] In Canada, the Supreme Court in *R v. Smith* 2004 SCC 14 (CanLII) [2004] 1 SCR 385 held that when an appellant in a criminal appeal dies, the court retains jurisdiction to proceed with the appeal "in the interest of justice". The court further held that:

Once the appeal is properly constituted with a live appellant, the court must then consider whether to exercise its jurisdiction to hear the appeal despite it being rendered moot by the death of the accused, or to abate the appeal. **The general test is whether there exist special circumstances that make it "in the interests of justice" to proceed.** That question may be approached by reference to the following non-exhaustive factors: the presence of a proper adversarial context; the strength of the grounds of appeal; the existence of special circumstances that transcend the death of the individual/respondent, such as a legal issue of general public importance, a systematic issue related to the administration of justice, or **collateral consequences to the family of the deceased, to other interest persons,** or to the public; the expenditure of limited judicial (or court) resources; and whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing legislative-type pronouncements more properly left to the legislature itself. Those cases in which it will be proper to exercise jurisdiction will be rare and exceptional. (emphasis added)

[37] Hence, whilst the doctrine of abatement has taken a firm root in most common law jurisdictions for some time, there has been in the recent years a move to relax and loosen the rigidity of its application, and in appropriate cases where justice demands it, the courts have allowed for substitution and the continued prosecution of the appeal. This is especially so when the party applying to substitute shows a legal interest in prosecuting the appeal in his own behalf or on behalf of the deceased appellant's estate.

[38] This was the approach taken by the Supreme Court of Nigeria in *Re: Abdullah* (2018) LPELR-45202 (SC). In that case, the court was faced with a novel issue, which is, whether the applicants (widow and son of the deceased appellant) can substitute the deceased appellant, who had a pending criminal appeal in that court at the time of his death. The facts were that following the conviction of the deceased appellant in the lower court, his property was forfeited to the respondent by an order of forfeiture. Under Nigerian law the general principle was that upon the death of an appellant in a criminal appeal, the proceeding terminates. However, it was argued by the applicants, who were also the administrators of the estate of the deceased, that the blanket application of the general principle would be unjust and inequitable, as under Nigerian law, unlike civil appeals, there is no provision for continuation of a criminal appeal on the death of the appellant. The applicants submitted that whilst there may not be an express provision for the continuation of a criminal appeal upon the appellant's death, the court had the power to allow them to continue with the appeal within the limited scope of the application and the peculiar circumstances of the case. The English cases of *R v. Rowe* (*supra*), *Hodgson v. Lakeman* (*supra*) and *R v. Jefferies* (1968) 3 All ER 238 were cited and relied on by the applicants in support of their contention that in the absence of specific statutory provisions the courts can allow the continuation of an appeal in a situation such was presented in that case. The applicants were seeking to be allowed to continue with the appeal limited to the extent of the legal interests of the heirs of the estate of the deceased appellant, and to exercise the inherent power of the court to provide a remedy to redress the same. The Indian case of *Bondada Gajapathy Rao v. State of Andhra Pradesh* (1964) AIR 1645 was also referred. The applicants made it abundantly clear that they wish to continue the appeal to protect their rights as successors and administrators of the estate of the deceased appellant, and nothing more.

[39] Amina Adamu Augie JSC, in allowing the application of the wife and son of the deceased appellant to substitute and continue with the prosecution of the appeal, held as follows:

> I have weighed every angle of the arguments for and against this Application, and I find myself leaning towards the position advanced by the Applicants. Yes, with regard to criminal cases, prosecution ceases with the death of an accused, which goes without saying, since no sentence can be passed on the accused, who is already dead. To put it in clear perspective, in a civil trial, if the Plaintiff or Defendant dies, their estate would usually continue. So, if the Plaintiff dies, the beneficiaries and heirs to the Plaintiff's estate inherit the lawsuit, and they may choose to continue to press for damages, which becomes their property.
>
> Similarly, when a Defendant dies during a civil lawsuit, his estate may be forced to defend the Suit in order to prevent a Judgment that is detrimental to the case, and the estate is, therefore, substituted for the deceased Defendant.

> In a criminal trial, there is no Plaintiff, and that role is taken by the State, which cannot die. If the accused or defendant dies, that is the end of the case. In this case, the deceased Appellant dies after he filed an Appeal in this Court, wherein he raised the complaint in the said Ground 9 of his Grounds of Appeal.

[40] Ground 9 of the grounds of appeal, referred to by Amina Adamu Augie JSC, was on the legality and validity of the forfeiture order made by the lower courts. The effect of that forfeiture order if left unchallenged by the abatement of the appeal would have dire consequences for the estate. In this regard, the learned judge went on to consider the English and Indian cases referred to earlier in this judgment, and surmised as follows:

> As I said earlier, I am walking a tightrope in considering this Application; I cannot say that the estate of the deceased Appellant suffered a wrong at the hands of the Respondents; that is a substantive issue best left for the Appeal. **However, I can say that the Applicants are entitled to be heard on the matter.**
>
> The reason is simple: there is nowhere else for the Applicants to go since the Court of Appeal already made a pronouncement on the merits of the Appeal filed by the deceased Appellant in that Court. The deceased Appellant died after filing the Appeal against the decision of the Court of Appeal in this Court. Yes, the Appeal died with the deceased Appellant, but his estate survived him, and being **Administrators of the deceased Appellant's estate, the Applicants have an interest in his estate that lives on,** and which cannot be left hanging. Hanging, in the sense that the Court of Appeal is *functus officio*, and they cannot go to any lower Court to complain about the wrong done to the estate. The Applicants are, therefore, between a rock and a hard place. It is the duty of this Court, which is placed above the Court of Appeal, to provide a remedy, and that it is to allow them air their grievance, and let this Court decide its merit. Obviously, with the arguments raised by the Parties, this is the only way to go. (emphasis added)

[41] The other four Supreme Court Judges in that Nigerian case concurred with the main judgment of Amina Adamu Augie JSC. Kumai Bayang Aka'ahs JSC added:

> *The interest which will support an application for leave to appeal as interested party must be genuine and legally recognizable interest in respect of a decision which prejudicially affects such a person.* And for a person to qualify as a person interested, *the applicant must show not only that he is a person having an interest in the matter but also that the order of judgment of the Court below which he is seeking leave to appeal against prejudicially affects his interest.* In other words, to succeed in the application, the applicants must show that they are persons who are aggrieved or persons against whom decisions have been produced which have wrongfully refused them something or wrongly affected their title to something. (emphasis added)

Another of the judges, Kudirat Motonmori Olatokunbo Kekere-Ekun JSC, noted in his judgment that, in addition to the reasons contained in the main judgment of the court, he too would allow the application for the following reason:

> In the Indian and English cases cited by learned counsel for the applicants, I am persuaded that having regard to the fact that the decision of the lower Court affects the pecuniary interest of the applicants in the estate of the deceased ... the justice of the case requires that they be permitted to challenge the decision ...

[42] In the overall, the Nigerian Supreme Court unanimously held that the applicants, being heirs and administrators of the estate of the deceased appellant had a genuine and legally recognisable interest in the estate of the deceased to challenge the forfeiture order, and thus allowed the substitution. The estate's interest was apparent, as a successful prosecution of the appeal would result in the reversal of the forfeiture order, and hence there was a clear pecuniary and/or property interest, which the estate was entitled to claim.

[43] The Nigerian Supreme Court had also referred to *Bondada Gajapathy Rao v. State of Andhra Pradesh* (*supra*), where the Indian Supreme Court had held:

> *The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to be the effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceeding and allow to continue it.* A sentence of fine no doubt affects the property. In the present case, however, the sentence was not of fine but of imprisonment which on the death of the accused has become infructuous. There is no one now who can be imprisoned. It is, however, said that though that sentence can no longer be executed, it still affects the property of the deceased and the legal representatives are, therefore, interested in the appeal and should be permitted to continue it. (emphasis added)

In *Bondada Gajapathy Rao v. State of Andhra Pradesh* case, the Supreme Court did not find such a legal interest to have been demonstrated for the exercise of discretion to allow the substitution. However, that does not detract from the fact that in appropriate cases, where sufficient legal interest is shown, the court does have the power to allow the appeal to continue by the substitution of party with that requisite legal interest.

[44] Similarly, the Federal Court in *Choo Cheng Liew* (*supra*) had held that the "representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a 'sentimental interest'". Hence, recognising the principle that in appropriate cases substitution may be allowed. The applicant for substitution must show it was an exceptional case in which the discretion should be exercised in favour of

continuation of the appeal. In the present case, the applicant/widow has shown a genuine and legally recognisable pecuniary interest in pursuing the appeal. In fact, the right to receive derivative pension, if the appeal were to be successful, would be a right to livelihood, to live out her golden years without hardship and with dignity. And the constitutional right to life, as embodied in art. 5(1) of the Federal Constitution, has been interpreted broadly to include the right to livelihood. See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, CA.

[45] In the present case, the applicant is premising her application on her prospective derivative pension rights as a widow of a civil servant who was on the pensionable scheme of service. Pension rights are constitutionally protected under art. 147 of the Federal Constitution and relevant statutes. Whilst s. 3(1) of the Pensions Act 1980 says that an officer shall not "have an absolute right to compensation for past service or to any pension, gratuity or other benefit" under the Act, the right to receive pension is statutorily regulated. And once a person comes under the pension scheme, the law would treat all officers under the scheme equally. A civil servant who has not misconducted himself has legitimate expectation to receive pension on his retirement in accordance to the terms of service, and in the event of his untimely death during service, his widow would be entitled to derivative pension. Section 14(1) of the Pensions Act 1980 provides:

> **14 A derivative pension or gratuity where an officer dies in service**
>
> (1) Subject to section 16, where a pensionable officer dies in service, the Yang diPertuan Agong may grant to the person prescribed in the regulations a derivative pension of not less than one-fifth of the deceased officer's last drawn salary and a derivative gratuity or a derivative gratuity only.

Further, reg. 15 of the Pensions Regulations 1980 provides:

> (1) A derivative pension or a derivative retiring allowance may be granted to:
>
> (a) the widow or the widower;

[46] The fact that the applicant would be entitled to receive derivative pension as the widow of the appellant, if his conviction is quashed, is not in dispute. In this regard, s. 21 of the Pensions Act 1980 is instructive, and it reads:

> **21 Pension, etc. to cease on conviction**
>
> (1) Subject to subsection (2), where any person to whom a pension or other benefit has been granted under this Act is sentenced to death or to any term of imprisonment by a Court, such pension or other benefit shall cease forthwith.

A (2) The pension or other benefit under subsection (1) shall be restored with retrospective effect in the case of a person who after conviction receives a free pardon.

(3) Where a pension or other benefit ceases under subsection (1), the Yang di-Pertuan Agong may grant an alimentary allowance equivalent to
B the whole or any part of such moneys to which the pensioner would have been entitled by way of pension or other benefit as he thinks proper to the pensioners wife or children for their maintenance and benefit and, after the expiration of his sentence, to such pensioner himself.

Hence, the outcome of the pending appeal will affect the pecuniary rights and
C interest of the applicant as the widow of the appellant.

[47] It is well-settled that an appeal is a continuation of proceedings by way of a re-hearing, and an appeal court may subject the evidence to a critical re-examination and the Court of Appeal is free to determine whether or not the findings of the Sessions Court and the High Court are correct. See *PP v.*
D *Azilah Hadri & Anor* [2015] 1 CLJ 579, FC; *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800, FC. Hence, the finding of guilt and conviction by the trial court, and the High Court on appeal, cannot be construed as being final, when there is a pending appeal at the Court of Appeal, which is a continuation of proceedings. Therefore, there is legitimate expectation for anyone with a
E legal interest in the outcome of the appeal to exhaust the entire appeal process. Thus, to allow the doctrine of abatement on death to bring an appeal to an abrupt end, and hence, leaving the conviction standing without anything more, could cause injustice to persons with such a legal interest or right.

F **[48]** In the overall, considering the law as it stands, and the development of the law in respect of abatement in other jurisdictions, as well as the justification presented by the applicant to substitute and continue with the appeal, we find that the time has come to loosen the rigid application of the doctrine of abatement, so that justice may be done to parties with sufficient
G legal interest.

[49] We believe that the time has come for us to move in tandem with developments in this area of the law. As observed by Lord Denning MR in *Parker v. Parker* (1954) 15 All ER 22 – "if we never do anything that has not been done before, the law will stand still, while the rest of the world moves
H on". This is an area of the law that is ripe for reform. In this regard, it may be appropriate for the Attorney General's Chambers to consider and propose amendment to s. 320 of the CPC, as had been done in other jurisdictions as regards their equivalent statutory provisions.

[50] In the premise of the foregoing, in so far as it concerns pending
I criminal appeals before the Court of Appeal, we find that in circumstances where the appellant dies during the pendency of the appeal, the appeal does

not automatically abate. In appropriate cases where sufficient legal interest is shown, the court does have the power to allow the appeal to continue by the substitution of party with that requisite legal interest. Such legal interest is manifest where there is clear pecuniary and/or property interest, which the estate, or the applicant, was entitled to claim upon successful prosecution of the pending appeal. We find that, for the reasons discussed above, the applicant as widow of the appellant, has demonstrated sufficient legal interest in the outcome of the appeal to substitute the appellant and continue to prosecute the appeal. The applicant's interest is genuine and legally recognised, and the decision of the court in respect of the pending appeal would potentially affect her rights to derivative pension. Now, if a sentence of fine, or a composite sentence of fine and imprisonment, could save an appeal from abatement merely by reason of the pecuniary interest of the State and the appellant's estate in the fine, however paltry a sum it may be, then surely a far greater pecuniary interest to derivative pension rights must be accorded equal, if not higher, importance.

[51] Wherefore, we allowed the application in the notice of motion (encl. 15), and made the following orders:

(i) that the applicant, S Ponnamah a/p Sinnappan, who is the widow of the appellant is appointed as the personal representative of the deceased appellant;

(ii) that the applicant, S Ponnamah a/p Sinnappan, as personal representative of the deceased appellant, be allowed to substitute the appellant and continue to prosecute the appeal;

(iii) that the applicant, S Ponnamah a/p Sinnappan, as personal representative of the deceased appellant, be named as the appellant in place of the deceased appellant in all cause papers filed and to be filed in the proceedings; and

(iv) there shall be no order as to costs.